Filed 5/7/19 P. v. Alvarado CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FABIAN ALVARADO, Defendant and Appellant.	H045500 (Monterey County Super. Ct. No. SS161207A)

I. INTRODUCTION

Defendant Fabian Alvarado appeals after a jury found him guilty of first degree murder (Pen. Code, § 187, subd. (a)),[1] two attempted murders (§§ 664, 187, subd. (a)), and shooting at an inhabited dwelling (§ 246). The jury also found true the allegations that defendant committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1), (5)) and that he or a principal personally and intentionally discharged a firearm during the commission of the murder (§ 12022.53, subd. (d)) and the attempted murders (§ 12022.53, subd. (c)). The trial court sentenced defendant to 120 years to life.

On appeal, defendant contends that insufficient evidence supports one of the attempted murder convictions, the trial court erred when it imposed a 15-year minimum parole eligibility period for each count of attempted murder under section 186.22,

[1] All further statutory references are to the Penal Code unless otherwise indicated.

subdivision (b)(5), and insufficient evidence supports the jury's determination that defendant committed the offenses for the benefit of a criminal street gang. For reasons that we will explain, we will order that the judgment be modified to stay the 15-year minimum parole eligibility terms imposed on the attempted murders pursuant to section 186.22, subdivision (b)(5) and affirm the judgment as modified.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Evidence*

1. The Shooting

Mario Doe lived with his wife, Lizette, and their two young children in a house on Block Avenue in Salinas.[2] Also living in the home were Lizette's parents, Javier and Elizabeth, her brother, Anthony, her brother, José, José's wife, Nancy, and their two kids.

There was a gang presence in the neighborhood. Mario did not have any experience with gangs, but José associated with the Sureños beginning in middle school and continuing through high school. José went to Mexico when he was 19, and when he returned to Salinas when he was around 23, he no longer associated with the gang.

On the afternoon of May 8, 2016, Mario worked on a gray Jeep and a green Jeep parked in the driveway in front of the garage. When José and his family returned home around 3:30 p.m., José began helping Mario. José and Mario worked on the cars together for the rest of the day and into the evening.

At some point later that night, Javier went to see if Mario and José had finished working on the cars so that he could put his own vehicle away. Javier began chatting with José and Mario outside. Lizette then left the house around 10:45 p.m. to go to Target to check her work schedule. Javier, José, and Mario were in the driveway when

[2] We will refer to the victims and their family members by their first names for clarity and to protect their privacy interests. (See Cal. Rules of Court, rule 8.90(b)(4), (11).)

Lizette left; Elizabeth, Nancy, Nancy and José's children, and Lizette's and Mario's children were inside the house.

Javier saw someone approach Mario from behind and stand beside him. The person was wearing a gray hooded sweatshirt with the hood pulled up and dark pants. Javier could not see the person's face. Javier then heard a shot fire "up close" to Mario. Javier moved into a corner of the garage and heard lots of gunshots. Javier could not see Mario at that point, but José was moving around the side of a car dodging bullets as he was being shot at. The shooter was about a foot and a half away from Javier, but he never went inside the garage. The shooter walked up and down the driveway between the Jeeps, shooting. One of the gunshots passed by Elizabeth as she was standing inside the front door holding her grandson. The shot "hit the living room."

At some point there was a pause in the shooting, and Javier "peeked" and saw a blue Expedition with a driver inside waiting for the shooter. The shooting resumed. The shooter, whose back was towards Javier, walked between the Jeeps in the driveway, trying to shoot José. Then, everything went silent. Javier exited the garage, but the shooter was still there, moving towards the street. The shooter took off in the car, and José ran inside the house. Mario was "practically at [Javier's] feet." Javier stayed there looking at Mario, and all of the other family members came outside. José came out of the house with a gun and started running after the Expedition while shooting, but the vehicle was already on the next block.

Police arrived shortly after the shooting. Mario was underneath a Jeep and wasn't breathing. Police administered CPR.

Mario had been shot four times and died from multiple gunshot wounds. One gunshot entered his left upper back and exited his right upper back near his neck. A second gunshot entered his left lower chest and exited his left upper chest. The third gunshot was to Mario's right upper abdomen, and a 9-millimeter bullet was recovered in Mario's left shoulder. The bullet had traveled through Mario's colon, stomach, liver,

heart, left lung, and a left rib. This bullet wound was sufficient to cause death within a matter of minutes. Mario also had a graze gunshot wound to the skin on his left calf.

2. The Police Investigation

Police recovered between nine to twelve 9-millimeter casings at the scene, all but two of which were fired from the same gun. Police found most of the casings near Mario's body, the top portion of which was in the garage, and between the Jeeps in the driveway, but two of the casings were found in the street. Casings were recovered under Mario's head, near Mario's head, and near his feet. Police located bullet strikes to the following locations: a gutter on the front of the garage, the garage's stucco, a fence, a Ford F150 parked in the driveway, the green Jeep's license plate, the gray Jeep's driver's side windshield, and a metal door leading into the residence from the garage. A fired bullet was found inside the home. The green Jeep's driver's side window and rear window were shattered.

Salinas Police Detective Rodolfo Roman collected video footage from nearby residential surveillance cameras. Detective Roman observed a Ford Expedition in footage from a Block Avenue home's camera starting at approximately 10:24 p.m. The vehicle passed the Block Avenue residence again at 10:31 p.m. and 10:40 p.m. At 10:44 p.m., the vehicle stopped in the middle of the road, its headlights turned off, and the interior light and running board lights illuminated. Detective Roman saw someone get out of the rear passenger seat and run behind the vehicle toward Mario's house. The suspect was wearing a gray hooded sweatshirt and dark colored pants. The suspect was out of the camera's range for about 10 seconds before he could be seen running back to the vehicle. As he ran back, he turned around and shot two to three times. The vehicle sped away as soon as the shooter got in.

The video showed that the vehicle was dark in color and had side running boards, missing chrome covers on its wheels, and reflectors on each side of the rear license plate.

When the interior light came on, Detective Roman could see an object hanging from the car's rearview mirror.

Video surveillance footage from a residence on Shires Way first showed the vehicle drive by at 10:31 p.m. The vehicle passed by again at 10:44 p.m. Detective Roman observed that the vehicle had paint damage by its front and rear passenger doors.

The day after the shooting, Salinas Police Detective Gabriel Gonzalez was driving around the neighborhood trying to get video surveillance footage from other residences when he spotted a Ford Expedition that looked like the vehicle in the video footage. The Expedition had running boards, reflective strips on the bumper, and some paint damage consistent with the vehicle in the video footage. The detective initiated a traffic stop and contacted defendant in the driver's seat. A round item was hanging from the rearview mirror that was similar to the item seen in the video. Defendant was wearing a gray hooded sweatshirt, a gray t-shirt, black sweatpants, red shorts, and gray and black Nikes. Defendant's sweatshirt later tested positive for gunshot residue.

After collecting additional video surveillance footage, police were able to determine that the suspect vehicle passed the victims' home nine times, beginning at 4:12 p.m. The vehicle stopped near the victims' house on the tenth trip. Some of the video footage showed the driver wearing a gray shirt. Other video showed the driver wearing a gray, long-sleeved item of clothing.

Police searched defendant's residence in Salinas. A 9-millimeter Ruger handgun was found in his parents' bedroom closet. The gun's magazine contained 10 live rounds of 9-millimetter ammunition. Police also located a loaded .40 caliber Ruger semiautomatic handgun and a loaded .357 Taurus magnum revolver in a black gun case on the closet floor. The 9-millimeter and .40 caliber handguns were unregistered; the .357 magnum was registered to someone in Fresno who was unaware the firearm was missing. Police found 21 rounds of 9-millimeter ammunition, eight rounds of .38 special ammunition, 44 rounds of .22 caliber ammunition, one round of unknown caliber, two 9-

millimeter magazines, a magazine loader, and a digital scale in a nylon lunch container on the closet floor.

Police searched defendant's cell phone. Defendant had several images of firearms on his phone. One was a May 6, 2016 photograph of the 9-millimeter Ruger handgun found at defendant's residence. The phone also contained multiple images pertaining to the Norteño and Sureño gangs and several images of a "SK" tattoo. One image was of the local Norteño rapper Yantz and the other was of a red flag with a huelga bird. Another photo depicted defendant making a "B" symbol with his hand. The letter "B" is commonly associated with the Boronda and Santa Rita Bahamas Norteño criminal street gangs. There was also an image from a May 9, 2016 morning news program about a deadly shooting. Listed in defendant's phone contacts was the user name "GUNNA400BLK," which was attributed to Siake Tavale. The Boronda gang is commonly associated with the 400 block and the term "gunna" means possessing or using a weapon. There was also an Instagram account with the user name "831_Shooter" and a Snapchat account with the user name "Shooter_400" and the account name "Shooter." "831" is the local area code. It was unclear who those accounts belonged to.

In 2016, defendant's mother, Rosabla Hernandez, owned a blue Expedition. The vehicle had reflectors on the back bumper and also had some paint damage. Hernandez identified the Expedition to the police in a photograph. When Hernandez was interviewed by the police on May 11, 2016, she stated that defendant had left her residence sometime after 10:00 p.m. on May 8 and returned sometime after 10:45 p.m.[3] Hernandez told the police that defendant put the firearms in her closet on May 9.

[3] Hernandez gave the police different time spans in other interviews. In one interview she said defendant was gone from the residence between 10:15 p.m. and 10:20 p.m. In another she told police defendant left as early as 9:00 p.m. and returned as late as 11:15 p.m. She also told police defendant never left the house.

A criminalist later determined that the bullet recovered from Mario's body was fired from the 9-millimeter Ruger found in defendant's mother's closet.

3. Gang Evidence

On February 13, 2013, when defendant was 14 years old and a student at Harden Middle School in Salinas, he punched another student in the face 10 times. The victim's notebook had markings on it that consisted of three dots and the letter "S." Defendant's notebook had the letters "NS" in it. "NS" stands for North Salinas and is used by Norteños to define their location in Salinas. Defendant told the officer who responded to the incident that he "hangs out with the Norteños" and that he avoids associating with Sureños. Defendant denied that the assault was gang-related.

On September 16, 2013, an attempted armed robbery occurred at Classic Coachworks in Monterey. Defendant was identified by the business owner as the robber who pointed a gun at him and at a coworker's head. Police apprehended defendant in the getaway vehicle shortly after the robbery occurred. The other individual in the car was Fabian Robledo. Both defendant and Robledo had the same tattoo of the letter "B." Robledo also had "NSB" tattooed on his lower abdomen. Defendant denied being involved in the robbery and associating with a criminal street gang but admitted being in the possession of a handgun.

Salinas Police Officer Vicky Burnett registered defendant as a gang member in November 2015. Defendant told Officer Burnett that he had been a Norteño gang member since he was 15 years old and "claimed the Northside Boronda." Defendant said there were approximately 2,000 Norteño gang members in Salinas and 50 of them claimed Northside Boronda. According to defendant, Norteños engaged in robberies, murders, and shootings. Defendant stated that Norteños consider Sureños their rivals.

Salinas Police Detective Derek Gibson testified for the prosecution as an expert on the Norteño and Sureño criminal street gangs. Detective Gibson was assigned to gang investigations and served three years on the Monterey County Joint Gang Task Force.

He had received over 182 hours of formal gang recognition and investigation training. Detective Gibson had investigated "[h]undreds" of gang-related crimes, including narcotic sales, firearm possession, murders, attempted murders, assaults with a deadly weapon, burglaries, robberies, and carjackings. Detective Gibson stated that he "accumulate[d] gang intelligence" from active gang members and gang dropouts, speaking with other Monterey County and Salinas police officers, reading "debriefs done by other officers on active gang members and dropout gang members," and talking to victims, suspects, and confidential informants in conducting his own investigations. Detective Gibson had interviewed "[h]undreds" of gang members and had personally investigated at least 100 crimes committed by the Norteños and at least five crimes involving the Northside Boronda.

According to Detective Gibson, over a thousand individuals claim membership in the Norteño criminal street gang in Salinas, and the gang has five active subsets that operate there. A subset is a street gang operating within a neighborhood. The Norteño subsets in Salinas work together.

The Norteño gang abides by the 14 bonds, which are the bylaws created by the Nuestra Familia prison gang. The Norteños and their subsets identify with the color red, the huelga bird, and the number 14 because "N" is the fourteenth letter of the alphabet. Norteños gang members are rivals with Sureños.

The Northside Boronda is one of the Norteño subsets operating in Salinas and had at least 50 members in May 2016. In addition to the Norteño symbols, the Northside Boronda subset identifies with the "B" from the Budweiser logo and the number 400, which stands for the 400 block of a street in the Boronda neighborhood of Salinas. In Detective Gibson's opinion, in May 2016, the Norteños and the Northside Boronda were ongoing organizations or associations and their members individually or collectively engaged in a pattern of criminal gang activity. "[A]s of May 2016," the "primary crimes" committed by the Monterey County Norteños and the Northside Boronda were homicide,

attempted homicide, robbery, carjacking, drug sales and possession, and firearm possession.

Detective Gibson testified regarding several predicate crimes committed by individuals the detective opined were members of the Northside Boronda subset. Detective Gibson assisted in the investigation of a robbery committed on November 29, 2014 by Juan Gomez. On August 7, 2015, Gomez pleaded no contest to the robbery and admitted that he committed the offense for the benefit of a criminal street gang. Detective Gibson opined that Gomez was a member of the Northside Boronda subset. Detective Gibson testified that he was familiar with Bobby Carillo. Carillo possessed a concealed firearm and participated in a criminal street gang in June 2013, and pleaded no contest to the offenses on August 9, 2013. In Detective Gibson's opinion, Carillo was a member of the Northside Boronda subset. Detective Gibson also stated he was familiar with Fabian Robledo. On December 5, 2013, Robledo pleaded no contest to committing an attempted robbery and participating in a criminal street gang on September 16, 2013. In the detective's opinion, Robledo was a member of the Northside Boronda subset at the time of the crime. Detective Gibson testified he was familiar with Dakota Casperson. On March 2, 2007, Casperson pleaded no contest to possessing a controlled substance for sale for the benefit of a criminal street gang on January 9, 2007. In Detective Gibson's opinion, Casperson was a member of the Northside Boronda subset. Detective Gibson was also familiar with Antonio Barajas. On October 19, 2004, Barajas pleaded no contest to possessing a controlled substance for sale for the benefit of a criminal street gang while armed with a firearm on June 15, 2004. In Detective Gibson's opinion, Barajas was a member of the Northside Boronda subset. The prosecution moved the conviction records pertaining to these crimes into evidence.

Defendant has a tattoo of the letters "SK" on his chest, which in the gang community stands for "scrap killer." "Scrap" is a derogatory term Norteños use for Sureños. Based on Detective Gibson's training and experience, in order to "earn" the

"SK" tattoo, an individual must kill a rival or a Sureños gang member. Defendant also has a "B," similar to the "B" from the Budweiser logo, tattooed on his left forearm. The "B" signifies membership in the Northside Boronda subset. In addition, defendant has four dots burned into his left arm. The tattoos indicated to Detective Gibson that defendant is a member of the Northside Boronda subset. Detective Gibson testified that defendant has the gang moniker "Shooter," which means defendant is willing to carry and use a gun.

Detective Gibson reviewed the reports of defendant's fight in middle school on February 9, 2013. When asked a hypothetical question that mirrored the facts of the fight, Detective Gibson opined that the perpetrator was willing to fight rival gang members on behalf of the Norteños and to bolster his own reputation. Detective Gibson also reviewed the reports from an attempted armed robbery on September 16, 2013. When given a hypothetical that mirrored the facts of the attempted robbery at Classic Coachworks, Detective Gibson opined that the facts signified that the perpetrator was willing to commit a crime in association with another Norteño member to benefit the Norteño street gang. Detective Gibson stated that based on his knowledge of Robledo and defendant, the attempted robbery showed they were committing a crime in association with one another.

When given a hypothetical based on the facts of this case, Detective Gibson opined that the shooting was committed to benefit the Norteño criminal street gang because it involved targeting a rival and would have bolstered the gang's reputation for violence and promoted the gang.

Detective Gibson opined that defendant was an active participant in the Norteño criminal street gang and the Northside Boronda subset based on his tattoos, his moniker, his associations, and the crimes he committed to benefit the gangs, including confronting rival gang members.

B. *Defense Evidence*

Defendant called two witnesses in his case-in-chief who had already testified for the prosecution, Javier and Detective Gonzalez. Defendant did not testify on his own behalf.

Javier testified that he told Detective Gonzalez that he saw a vehicle that looked like a Ford Expedition or Ford Explorer start driving through the neighborhood two months before the shooting and that the driver was alone in the vehicle. Javier described the driver to the detective as a dark-skinned man with his hair combed back. Javier was unable to identify the driver when the detective presented him with six photographs.

Detective Gonzalez testified that he interviewed Javier twice. During the second interview, Javier stated that he may have seen the vehicle involved in the shooting on prior occasions in the neighborhood. The vehicle was in "stock condition," without any damage or reflective strips. Javier described the driver as a dark-skinned male with wavy, slicked-back hair. Javier told the detective that he saw the vehicle drive by his residence over the course of about eight days. Detective Gonzalez presented Javier with a photographic lineup of six individuals, including defendant. Javier was unable to make an identification.

C. *Charges, Verdict, and Sentence*

Defendant was charged with first degree murder (§ 187, subd. (a); count 1), three counts of attempted murder (§§ 664, 187, subd. (a); counts 2-4), and shooting at an inhabited dwelling (§ 246; count 5). It was also alleged that defendant committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)) and that he personally used a firearm during the commission of the murder and the attempted murders (§ 12022.5, subd. (a)). In addition, regarding the murder, it was alleged that defendant personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)). Regarding the attempted murders, it was alleged that a principal personally and intentionally used and discharged a firearm (§ 12022.53,

subds. (b), (c), (e)(1)). During trial, the trial court granted the prosecution's motion to dismiss the section 12022.5, subdivision (a) firearm allegations.

A jury found defendant guilty of first degree murder (count 1), two counts of attempted murder (counts 2 and 4), and shooting at an inhabited dwelling (count 5). The jury also found defendant committed the offenses for the benefit of a criminal street gang. Regarding the murder, the jury determined that defendant or a principal personally and intentionally discharged a firearm causing death. Regarding the attempted murders, the jury found that defendant or a principal personally and intentionally discharged a firearm. The jury acquitted defendant of one count of attempted murder (count 3).

The trial court sentenced defendant to an aggregate term of 120 years to life, comprised of an indeterminate term of 25 years to life for the murder plus an indeterminate term of 25 years to life for the discharge of a firearm causing death and two indeterminate terms of 15 years to life for the attempted murders plus two determinate terms of 20 years for the discharge of a firearm. The court imposed and stayed an indeterminate term of 15 years to life for shooting at an inhabited dwelling.

III. DISCUSSION

A. *Sufficiency of the Evidence Supporting the Attempted Murder of Javier*

Defendant contends there is insufficient evidence to support his conviction of attempting to murder Javier (count 4). Defendant asserts that Javier's testimony establishes that defendant was unaware of Javier's presence during the shooting and that he was not shooting at or trying to shoot Javier. Thus, there is insufficient evidence that defendant harbored a specific intent to kill Javier, as required for an attempted murder conviction. The Attorney General counters that the conviction should be affirmed under a kill zone theory because there is substantial evidence that defendant intended to kill everyone in the area near the targeted victim. The Attorney General also asserts that the record supports a reasonable inference that Javier was visible to defendant during the shooting.

1. Background

Defendant was charged with the attempted murder of José (count 2), Elizabeth (count 3), and Javier (count 4). The trial court instructed the jury on each count of attempted murder separately using a modified version of CALCRIM No. 600, the pattern instruction on attempted murder.[4] Regarding count 4, the trial court instructed the jury: "The defendant is charged in Count 4 with the attempted murder of Javier Doe. To prove that the defendant is guilty of attempted murder of Javier Doe the People must prove that, one, the defendant took at least one direct, but ineffective step, toward killing Javier Doe; and, two, the defendant intended to kill Javier Doe. [¶] . . . [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or kill zone. [¶] In order to convict the defendant of the attempted murder of Javier Doe as charged in Count 4, the People must prove that the defendant not only intended to kill Mario [Doe], but also either intended to kill Javier Doe as charged in Count 4, or intended to kill everyone within the kill zone. [¶] If you have a reasonable doubt whether the defendant intended to kill Javier Doe as charged in Count 4, or intended to kill Mario [Doe] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Javier Doe as charged in Count 4."

Referencing the "zone of harm or the kill zone," the prosecutor argued to the jury that the shooting "wasn't localized to just Mario. No one ran up, just shot Mario, and backed up and ran away. [¶] They sprayed bullets across the area. There were at least 10 casings found at the scene matching the gun for the defendant. There are nine bullet

[4] The trial court initially instructed the jury on all of the attempted murder counts together using one modified version of CALCRIM No. 600. The trial court later clarified the attempted murder instructions by reinstructing the jury on each of the attempted murder counts separately using CALCRIM No. 600 after receiving a question from the jury regarding the kill zone theory. The trial court told the jury to "disregard the prior instruction number 600. I'm going to reread for you three instructions. I'm separating them out count for count, Counts 2, 3, 4, as opposed to combining them."

strikes across the house and the garage. . . . [T]hey covered the area with fire and they fled. [¶] . . . [¶] This wasn't someone who was satisfied with simply taking the life of Mario. This was someone who is going to get everyone they could in that area."

2. Legal Principles

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) " 'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

" '[G]uilt of attempted murder must be judged separately as to each alleged victim.' " (*People v. Stone* (2009) 46 Cal.4th 131, 141 (*Stone*); see also *People v. Perez* (2010) 50 Cal.4th 222, 230 (*Perez*).) "[T]his is true whether the alleged victim was particularly targeted or randomly chosen." (*Stone*, *supra*, at p. 141; *Perez*, *supra*, at p. 230.) "[I]ntent to kill does not transfer to victims who are not killed, thus 'transferred intent' cannot serve as a basis for a finding of attempted murder." (*Perez*, *supra*, at p. 232; *People v. Bland* (2002) 28 Cal.4th 313, 326-331 (*Bland*).) However, " '*Bland* . . . recognizes that a shooter may be convicted of multiple counts of attempted murder on a "kill zone" theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the "kill zone") as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. (*Bland*, *supra*, at pp. 329-330.)' [Citation.]" (*Perez*, *supra*, at p. 232.) "[T]he firing of an automatic weapon at a group of people on the street motivated by the desire to kill one particular person in the group" is an "example[] of facts that might support a 'kill zone' theory of attempted murder." (*Ibid.*)

"*Bland*'s kill zone theory of multiple attempted murder is necessarily defined by the nature and scope of the attack." (*Perez, supra*, 50 Cal.4th at p. 232.) For example, " 'consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.' " (*Bland, supra*, 28 Cal.4th at p. 330.)

In determining a sufficiency of the evidence claim, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

3. Analysis

We determine that a rational jury could have concluded beyond a reasonable doubt that defendant intended to kill everyone that inhabited the zone of harm or kill zone.

Defendant contends that Javier's testimony "shows that the shooter was not aware [Javier] was present and did not engage in any conduct designed to kill Javier." However, the kill zone theory of concurrent intent does not require awareness of the attempted murder victim's presence. (See *People v. Adams* (2008) 169 Cal.App.4th 1009 (*Adams*); *People v. Vang* (2001) 87 Cal.App.4th 554, 564 (*Vang*), cited with approval in *Bland, supra,* 28 Cal.4th at p. 330.)

In *Adams,* the defendant was convicted of the premeditated murder of one victim, by means of arson, and the attempted murder of three other people who were at the site of the fire. (*Adams, supra,* 169 Cal.App.4th at p. 1012.) Defendant argued that the attempted murder convictions should be vacated because she did not know that the three attempted murder victims were present when the fire was set. (*Ibid.*) The Court of Appeal rejected this contention, concluding that the concurrent intent theory articulated in *Bland* did not depend on the defendant's awareness of the presence of others. "[T]he concurrent intent doctrine permits a rational jury to infer the required express malice [or specific intent to kill] from the facts that (1) the defendant targeted a primary victim by intentionally creating a zone of harm, and (2) the attempted murder victims were within that zone of harm." (*Id.* at p. 1023.) It is not a defense that the defendant did not know the victims were present within the zone of harm. (*Ibid.*) " 'A kill zone . . . analysis . . . focuses on (1) whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm.' [Citation.]" (*Id.* at p. 1022.)

In *Vang*, the defendants were convicted of 11 counts of attempted murder after they fired multiple rounds from high-powered assault rifles at two residences. (*Vang*,

supra, 87 Cal.App.4th at pp. 558, 563.) The defendants contended that the evidence was insufficient to show they intended to kill anyone other than one person at each residence, "due to the location of bullets centered around the area where [the intended victim at each residence] could be seen from the street." (*Id.* at p. 563.) The Court of Appeal rejected the defendants' contention, holding that "malice aforethought 'is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.' [D]efendants manifested a deliberate intention to unlawfully take the lives of others when they fired high-powered, wall-piercing, firearms at inhabited dwellings. The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed." (*Id.* at p. 564.) The court concluded, "The jury drew a reasonable inference, in light of the placement of the shots, the number of shots and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residence they shot up. [Citations.] Defendants' argument might have more force if only a single shot had been fired in the direction of where [the two primary victims] could be seen." (*Id.* at pp. 563-564, fn. omitted.) Although *Vang* predated *Bland*, the California Supreme Court stated in *Bland* that *Vang* "can be considered a 'kill zone' case[] even though [it] d[id] not employ that term." (*Bland*, *supra*, 28 Cal.4th at p. 330.)

Here, it was reasonable for the jury to infer that " 'defendant intentionally created a zone of fatal harm' " when he fired multiple rounds in the driveway and garage area of the victims' home and that Javier " 'inhabited that zone of harm.' " (*Adams*, *supra*, 169 Cal.App.4th at p. 1022.) When the shooting started, Javier was talking with José and Mario and was "sitting in front of [Mario]" while José was underneath the green Jeep. Both the green and gray Jeeps were parked directly in front of the garage. The shooter approached Mario from behind, stood beside him, and fired a shot "up close." Multiple gunshots ensued as Javier moved into a corner of the garage. The shooter walked up and

down the driveway between the green and gray Jeeps, shooting as José dodged bullets. Javier was about a foot and a half away from the shooter. Police found between nine to twelve 9-millimeter casings at the scene. The green Jeep was struck by a bullet on its license plate, the driver's side window, and the rear window, and the gray Jeep was struck once on its windshield. A photograph admitted into evidence shows a bullet strike to a gutter on the front of the garage and to the garage's stucco. Police also found a fired bullet inside the garage. A red Mustang parked in the garage had a bullet fragment on its rear trunk and its rear windshield was shattered. There was also a bullet strike on a metal door leading from the garage into the residence "[a]s if someone had shot through the door," and a bullet was recovered inside the home. Video surveillance footage from a nearby residence showed the shooter fire two to three more shots as he ran back to the getaway vehicle. Based on this evidence, a reasonable jury could find that defendant's action of firing a barrage of shots at and near the garage intentionally created a zone of fatal harm that Javier inhabited.

In his reply brief, defendant quotes *People v. McCloud* (2012) 211 Cal.App.4th 788, 798 (*McCloud*), which states that "[i]n a kill zone case, the defendant does not merely subject everyone in the kill zone to lethal risk. Rather, the defendant *specifically intends* that *everyone* in the kill zone die." This language does not aid defendant. The California Supreme Court has described the kill zone theory as a "rule that applies when an intended target is killed and *unintended targets* are injured but not killed." (*Stone, supra*, 46 Cal.4th at p. 136, italics added.) "[I]f a person targets one particular person, under some facts a jury could find the person also, concurrently, intended to kill—and thus was guilty of the attempted murder of—other, *nontargeted*, persons. . . . For example, if a person placed a bomb on a commercial airplane intending to kill a primary target, but also ensuring the death of all the passengers, the person could be convicted of the attempted murder of all the passengers, and not only the primary target. [Citation.] Likewise, in *Bland*, '[e]ven if the jury found that defendant primarily *wanted to kill [the*

driver] rather than [the] passengers, it could reasonably also have found a concurrent intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers.' [Citation.]" (*Stone*, *supra*, at p. 137, italics added.)

Here, a jury could reasonably infer from the evidence that defendant intended to kill everyone present in the driveway and garage area of the victims' residence. A specific awareness and targeting of Javier was not required—if it were, there would be no need for the kill zone theory. (See *Stone*, *supra*, 46 Cal.4th at p. 140 [under the kill zone theory, "a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind"].)

Moreover, although not required to sustain a conviction under the kill zone theory, the jury could have reasonably inferred from the evidence that defendant was aware of Javier's presence. Javier had been chatting with Mario and José for "[a]bout five minutes" before the shooting started. Video surveillance footage collected by the police showed the Ford Expedition pass by the victims' residence at 10:31 p.m. and 10:40 p.m. before it stopped at the residence at 10:44 p.m. and the shooter exited the vehicle. In addition, Javier was sitting in front of Mario when the shooter walked up to Mario and fired the first shot.

For these reasons, we conclude there is substantial evidence in the record to support defendant's conviction of attempting to murder Javier.

B. *Fifteen-Year Minimum Parole Eligibility Periods Imposed on the Attempted Murders (Counts 2 and 4)*

Defendant contends that the trial court erred when it imposed 15-year minimum parole eligibility periods on counts 2 and 4 for the gang enhancements under section 186.22, subdivision (b)(5) in addition to the 20-year determinate terms for the firearm-discharge enhancements under section 12022.53, subdivision (c) because the jury

did not find that he personally used or discharged a firearm in the commission of those offenses, as required under section 12022.53, subdivision (e)(2) to impose both the gang enhancement and the firearm-discharge enhancement. We conclude that the punishment imposed for the gang enhancement must be stayed.

1. Background

Defendant was charged in counts 2 and 4 with attempted willful, deliberate, and premeditated murder within the meaning of section 664, subdivision (a).[5] It was also alleged that defendant committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1), (5),[6] and that a principal personally used and personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), and (e)(1).[7]

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[5] Section 664, subdivision (a) states in relevant part: "[I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole."

[6] Subdivision (b)(1) of section 186.22 states: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . [¶] . . . by an additional term of two, three, or four years at the court's discretion," except that "[i]f the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] . . . If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

Subdivision (b)(5) of section 186.22 states: "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served."

[7] Subdivision (b) of section 12022.53 states: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of

The trial court instructed the jury: "If you find the defendant guilty of Attempted Murder as charged in Counts 2, 3 or 4 and you find that the defendant committed those crimes for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether, for each crime, the People have proved the additional allegation that one of the principals personally and intentionally discharged a firearm during the crime. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime. [¶] To prove this allegation, the People must prove that: [¶] 1. Someone who was a principal in the crime personally discharged a firearm during the commission of the attempted murder; [¶] AND [¶] 2. That person intended to discharge the firearm. [¶] A person is a principal in a crime if he or she directly commits the crime or if he or she aids and abets someone else who commits the crime. . . ."

In her closing argument, the prosecutor discussed the firearm-discharge enhancement only as it pertained to the murder charge.[8] The prosecutor stated: "So what the judge described to you when he was talking about the law was what it means to be a principal. That means that if either the person directly commits the crime or even if he

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imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply."

Subdivision (c) of section 12022.53 states: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years."

Subdivision (e)(1) of section 12022.53 states: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

[8] Although the information alleged that defendant personally discharged a firearm in the commission of the murder (§ 12022.53, subd. (d)), the trial court instructed the jury that the prosecution had to prove "a principal in the crime personally discharged a firearm during the commission of the murder."

aids and abets in the crime . . . . [¶] And what that means here is that if you believe for whatever reason that the defendant aided and abetted in this crime, whether he was the shooter, the principal, whether he was the driver aiding and abetting, whether he supplied the car and gun knowing they were going to go commit a shooting, he is guilty not just of the murder, but of the gun enhancement and the gang enhancement." Later, regarding the kill zone theory, the prosecutor argued: "They sprayed bullets across the area. . . . [T]hey took their opportunity, they covered the area with fire and they fled." The prosecutor then argued that the evidence established that defendant killed Mario.

The verdicts for counts 2 and 4 stated that the jury found "that in the commission of [the] crime, the defendant or a principal, personally and intentionally discharged a firearm, within the meaning of . . . section 12022.53, subdivision (c)."

The trial court sentenced defendant on the attempted murders to two indeterminate terms of 15 years to life under section 186.22, subdivision (b)(5) plus two determinate terms of 20 years under section 12022.53, subdivision (c). Defendant did not object to the sentence imposed.

2. Analysis

This issue "involves the interplay between two highly complex statutes: section 186.22, which targets participants in criminal street gangs; and section 12022.53, also known as 'the 10-20-life law' [citation], which 'prescribes substantial sentence enhancements for using a firearm in the commission of certain listed felonies' [citation]." (*People v. Brookfield* (2009) 47 Cal.4th 583, 588 (*Brookfield*).)

Relevant here, subdivision (b)(5) of section 186.22 provides that "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . [¶] . . . [¶] . . . shall not be paroled until a minimum of 15 calendar years have been served," if the punishment for the underlying felony is life imprisonment. "The effect of section 186.22, subdivision (b)(5) is to

increase the minimum parole eligibility date on a willful, deliberate, and premeditated attempted murder sentence. Absent a determination the accused is subject to the enhanced sentencing provisions of section 186.22 or some other provision of law, a sentence for willful, deliberate, and premeditated murder is for a life term with a minimum wait for parole of seven years. (§ 3046, subd. (a)(1).) However, once a finding pursuant to section 186.22, subdivision (b)(5) is returned, the minimum wait for parole eligibility under a life sentence is increased to 15 years. [Citations.]"[9] (*People v. Salas* (2001) 89 Cal.App.4th 1275, 1280-1281 (*Salas*), fn. omitted.)

"Under section 12022.53, a defendant's *personal use* of a firearm in the commission of a specified felony results in an additional 10-year prison term (§ 12022.53, subd. (b)), personal and intentional discharge of a firearm leads to an additional 20 years (*id.*, subd. (c)), while personal and intentional discharge of a firearm resulting in death or great bodily injury to a person other than an accomplice adds a prison term of 25 years to life (*id.*, subd. (d)) to the sentence for the underlying crime." (*Brookfield*, *supra*, 47 Cal.4th at p. 589, italics omitted.)

"Subdivision (e) of section 12022.53 explains how a trial court is to sentence a defendant in a case in which the provisions of sections 186.22 and 12022.53 *both* apply." (*Brookfield*, *supra*, 47 Cal.4th at p. 590.) Section 12022.53, subdivision (e)(1) states: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." However, important here, subdivision (e)(2) of section 12022.53 provides: "An enhancement for

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[9] Former section 3046, subdivision (a) states: "No prisoner imprisoned under a life sentence may be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole."

participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

"Section 12022.53's subdivision (e)(1) has this effect: Ordinarily, section 12022.53's sentence enhancements apply only to *personal* use or discharge of a firearm in the commission of a statutorily specified offense, but when the offense is committed to benefit a criminal street gang, the statute's additional punishments apply even if . . . the defendant did not personally use or discharge a firearm but another principal did. Section 12022.53[, subdivision] (e)(2), however, limits the effect of subdivision (e)(1). A defendant who *personally* uses or discharges a firearm in the commission of a gang-related offense is subject to *both* the increased punishment provided for in section 186.22 *and* the increased punishment provided for in section 12022.53. In contrast, when another principal in the offense uses or discharges a firearm but the defendant does not, there is no imposition of an 'enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to' section 12022.53. (§ 12022.53[, subdivision] (e)(2).)" (*Brookfield*, *supra*, 47 Cal.4th at p. 590.)

In *Brookfield*, the California Supreme Court determined that the trial court erred when it imposed sentence enhancements under both section 186.22 and section 12022.53 because the jury determined that the defendant was a principal in the gang-related offense and that at least one principal used a firearm during the commission of the offense within the meaning of section 12022.53, subdivisions (b) and (e)(1). (*Brookfield*, *supra*, 47 Cal.4th at pp. 586, 592, 595.) The court observed that section 12022.53 distinguishes between gang offenders who personally used or discharged a firearm in the commission of the underlying felony and accomplices to a gang-related felony where another principal personally used or discharged a firearm. (*Id.* at pp. 593-594.) Only gang offenders who personally used or discharged a firearm may be punished under both the

gang and firearm-discharge enhancements; accomplices may not. (*Ibid.*; see also *Salas*, *supra*, 89 Cal.App.4th at pp. 1281-1282.)

Here, the jury determined regarding both of the attempted murders "that in the commission of [the] crime, *the defendant or a principal*, personally and intentionally discharged a firearm, within the meaning of . . . section 12022.53, subdivision (c)." (Italics added.) The Attorney General argues that "the jury functionally found that [defendant] personally discharged the firearm" based on its determination that defendant was guilty of shooting at an inhabited dwelling house and that "[t]he jury's verdicts here could only reasonably be construed as concluding that [defendant] personally discharged the firearm during the attempted murders."

"Where, as here, a jury's verdict is ambiguous, 'A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.' [Citations.]" (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1256.) In addition to the jury instructions, the information and the prosecutor's closing argument are considered when determining how a verdict may be reasonably construed. (*Ibid.*)

Based on the information, the jury instructions, and the prosecutor's closing argument, we conclude that we cannot reasonably construe the jury's verdict as a finding that defendant personally discharged a firearm in the commission of the attempted murders. The information alleged that "a principal personally used and intentionally discharged a firearm" in the commission of the attempted murders within the meaning of section 12022.53, subdivisions (b), (c), and (e)(1). The trial court instructed the jury that the prosecution had to prove that "[s]omeone who was a principal in the crime personally discharged a firearm during the commission of the attempted murder[s]." In closing argument, the prosecutor told the jury when explaining the term "principal" in conjunction with the firearm-discharge allegation attached to the murder count that "what that means . . . is that if you believe for whatever reason that the defendant aided and

abetted in this crime, whether he was the shooter, the principal, whether he was the driver aiding and abetting, whether he supplied the car and gun knowing they were going to go commit a shooting, he is guilty not just of the murder, but of the gun enhancement and the gang enhancement." She later argued when discussing the kill zone theory that "[*t*]*hey* sprayed bullets across the area" and "*they* took their opportunity, *they* covered the area with fire and *they* fled." (Italics added.)

The Attorney General observes that defendant "does not challenge the jury's finding under section 12022.53, subdivision (d) that [he] or a principal personally and intentionally discharged a firearm causing Mario's death." However, there is no basis to challenge that finding or the punishment imposed on the murder conviction. Unlike with the attempted murders, the trial court imposed only one sentence enhancement in conjunction with the murder—sentencing defendant to 25 years to life under section 12022.53, subdivision (d) for the discharge of a firearm causing death. The enhancement was properly imposed because, as explained above, subdivision (e)(1)(A) and (B) of section 12022.53 permits imposition of the section's enhancements on "any person who is a principal in the commission of an offense if" it is "pled and proved" both that "[t]he person violated subdivision (b) of Section 186.22" and that "[a]ny principal in the offense committed any act specified in subdivision (b), (c), or (d)." In contrast to the attempted murders, the trial court did not impose a sentence enhancement under section 186.22 *and* section 12022.53 for the murder, which would have run afoul of section 12022.53, subdivision (e)(2).

Accordingly, because we cannot reasonably construe the jury's verdict that "the defendant or a principal, personally and intentionally discharged a firearm" as a determination that defendant personally discharged a firearm during the commission of the attempted murders within the meaning of section 12022.53, subdivision (c), the judgment must be modified to stay imposition of the 15-year minimum parole eligibility

term imposed pursuant to section 186.22, subdivision (b)(5) on counts 2 and 4.[10] (§ 12022.53, subd. (e)(2); see *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129-1130; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238 [staying the 15-year minimum parole eligibility term imposed under § 186.22, subd. (b)(5) "because the jury found only that a *principal* personally used a firearm" in the commission of the offenses and a firearm use enhancement was also imposed under § 12022.53, subds. (d) and (e)].) Although defendant did not object to the sentence imposed, an unauthorized sentence, as we have here, is "subject to judicial correction whenever the error [comes] to the attention of the trial court or a reviewing court. [Citations.]" (*People v. Serrato* (1973) 9 Cal.3d 753, 763, disapproved on another ground by *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.)

C. *Sufficiency of the Evidence to the Support Gang Enhancements*

Defendant contends that the evidence fails to support the jury's findings that he committed the crimes for the benefit of a criminal street gang because there was insufficient evidence that the Norteño and Northside Boronda gangs' primary activities were the commission of one or more of the crimes enumerated in section 186.22, subdivision (e). Based on Detective Gibson's testimony, we conclude that the record contains substantial evidence that the Norteño and Northside Boronda gangs' primary activities were the commission of several of the crimes enumerated in the gang statute.

1. Legal Principles

Section 186.22, subdivision (f) defines a criminal street gang as "any ongoing organization, association, or group of three or more persons, whether formal or informal,

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[10] The abstract of judgment incorrectly omits the section 186.22, subdivision (b)(5) gang enhancements found true on counts 1, 2, and 4. We will order the abstract to be corrected as follows: the section 186.22, subdivision (b)(5) enhancement shall be listed in the "ENHANCEMENT[S]" section of the abstract (section 2) as applying to counts 1, 2, and 4. In the "TIME IMPOSED OR 'S' FOR STAYED" box, "S" shall be listed.

having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." Thus, as relevant here, "[t]o trigger the gang statute's sentence-enhancement provision (§ 186.22, subd. (b)), the trier of fact must find that one of the alleged criminal street gang's primary activities is the commission of one or more of certain crimes listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322 (*Sengpadychith*).) The acts enumerated in subdivision (e) include murder, felonious assault, robbery, possession of a controlled substance for sale, shooting at an inhabited dwelling, and unlawful firearm possession. (§ 186.22, subd. (e).) The attempted commission of those crimes also satisfies the " 'primary activities' " requirement. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1227-1228.)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in *Gardeley*[11] . . . . There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.] The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by

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11 *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), disapproved on another ground by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 3.

gang members,' together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]" (*Id.* at p. 324.)

"We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction." (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) " 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*Perez*, *supra*, 50 Cal.4th at p. 229.)

2. Analysis

Detective Gibson testified as an expert on the Norteño and Sureño criminal street gangs. Detective Gibson had received over 182 hours of formal gang training and was currently a gang intelligence detective investigating gang-related crimes. He had also been on the Monterey County gang task force for three years. Detective Gibson had investigated "[h]undreds" of gang-related crimes, including at least 100 crimes committed by Norteños and at least five crimes involving the Northside Boronda. Detective Gibson had also interviewed hundreds of gang members. Detective Gibson opined that in May 2016, the Norteños and the Northside Boronda were each an ongoing organization or association with three or more members individually or collectively engaging in a pattern of criminal gang activity. Detective Gibson identified homicide, attempted homicide, robbery, carjacking, drug sales and possession, and firearm possession as the "primary crimes" committed by the Monterey County Norteños and the Northside Boronda "as of May 2016."[12]

[12] Defendant acknowledges that Detective Gibson's testimony regarding the Norteños' and Northside Boronda's "primary crimes" represented the detective's opinion

One of the crimes Detective Gibson investigated involving a Northside Boronda member was a robbery committed on November 29, 2014 by Juan Gomez. Detective Gibson opined that Gomez was a member of the "Northside Boronda subset to the Norteño criminal street gang." Detective Gibson also testified to his familiarity with four other individuals he believed to be members of the Northside Boronda subset to the Norteño criminal street gang who were convicted of robbery, unlawful firearm possession, and narcotic sales, and the prosecution moved the conviction records for those crimes into evidence. Specifically, Bobby Carillo pleaded no contest to possessing a concealed firearm and participating in a criminal street gang in June 2013. Fabian Robledo pleaded no contest to committing an attempted robbery and participating in a criminal street gang on February 16, 2013. Dakota Casperson pleaded no contest to possessing a controlled substance for sale for the benefit of a criminal street gang on January 9, 2007. Antonio Barajas pleaded no contest to possessing a controlled substance for sale for the benefit of a criminal street gang while armed with a firearm on June 15, 2004.

In addition, when given a hypothetical based on the facts of this case, Detective Gibson opined that the crimes were committed to benefit the Norteño criminal street gang because they involved targeting a rival and would have bolstered the gang's reputation for violence and promoted the gang. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465 ["Past offenses, as well as the circumstances of the charged crime, have some tendency in reason to prove the group's primary activities, and thus both may be considered by the jury on the issue of the group's primary activities."].) Detective Gibson also testified that he had reviewed the facts of an incident on September 16, 2013. When given several hypotheticals based on the facts of the attempted armed robbery at Classic Coachworks on September 16, 2013 and the perpetrators' tattoos, clothing, and

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that "the commission of these crimes constituted the 'primary activities' of the gangs . . . ."

the images contained in their cell phones, Detective Gibson explained the significance of the tattoos, clothing, and images and opined that the crime was committed "in association with another Norteño gang member [to] further and benefit the Norteño criminal street gang." (See *People v. Garcia* (2014) 224 Cal.App.4th 519, 524 ["Because section 186.22, subdivision (e) contains both the options of 'commission' or 'conviction,' the statute expressly does not require that the offense necessarily result in a conviction."].) Detective Gibson opined that defendant was an active participant in the Norteño criminal street gang and the Northside Boronda subset based on his tattoos, his moniker, his associations, and the crimes he committed to benefit the gangs, including confronting rival gang members.

Defendant relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*) and *People v. Perez* (2004) 118 Cal.App.4th 151 to argue that there was insufficient evidence that the Norteños' and Northside Boronda's primary activities were the commission of crimes enumerated in the gang statute. In *Alexander L.*, the expert witness, who had been working in the gang enforcement unit for an unspecified period of time, testified regarding the primary activities of the Varrio Viejo gang: " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Alexander L.*, *supra*, at pp. 609, 611.) In concluding that there was insufficient evidence to support the gang enhancement, the Court of Appeal reasoned: "Lang's entire testimony on this point is quoted above—he 'kn[e]w' that the gang had been involved in certain crimes. No specifics were elicited as to the circumstances of these crimes, or where, when, or how Lang had obtained the information. He did not directly testify that criminal activities constituted Varrio Viejo's primary activities. Indeed, on cross-examination, Lang testified that the vast majority of cases connected to Varrio Viejo that he had run across were graffiti related. [¶] Even if we could reasonably infer that Lang meant that the

primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation. 'The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and *be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates*. [Citations.]' [Citation.]" (*Id.*, at pp. 611-612, fn. omitted.)

In *People v. Perez*, the evidence showed that the gang in question was responsible for the "retaliatory shootings of a few individuals over a period of less than a week, together with a beating six years earlier." (*People v. Perez*, *supra*, 118 Cal.App.4th at p. 160.) The Court of Appeal concluded that this evidence was insufficient to establish that gang members had " '*consistently and repeatedly* . . . committed criminal activity listed in the gang statute.' [Citation.]" (*Ibid.*) The court observed that "[n]o expert testimony such as that provided in . . . *Gardeley*, *supra*, 14 Cal.4th at page 620 . . . was elicited here." (*Ibid*.)

Alexander L., *supra*, 149 Cal.App.4th 605 and *People v. Perez*, *supra*, 118 Cal.App.4th 151 are distinguishable from the present case. Here, Detective Gibson testified regarding his gang training, his conversations with gang members, and his participation in gang investigations in Monterey County. This testimony provided a reliable basis for Detective Gibson's expert opinion on the primary activities of the Salinas Norteños and the Northside Boronda. (See *Sengpadychith, supra*, 26 Cal.4th at p. 324.)

Defendant also argues that "Gibson's testimony concerning specific crimes shows that between 2004 and 2017, five members of Northside Boronda committed six crimes listed in section 186.22, subdivision (e)," and that once his offenses are included, "the number increases to six gang members committing 10 crimes over a period of 14 years. Ten enumerated crimes in 14 years committed by a gang with 50 members does not constitute substantial evidence that commission of those crimes is a primary activity of

that gang." However, defendant overlooks Detective Gibson's opinion testimony, similar to the expert testimony in *Gardeley*, *supra*, 14 Cal.4th 605, that the primary activities of the Northside Boronda included several of the offenses enumerated in section 186.22. (See *Sengpadychith*, *supra*, 26 Cal.4th at p. 324 ["Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. *Also sufficient* might be expert testimony, as occurred in *Gardeley*, *supra*, 14 Cal.4th 605." (Second italics added.)].) The prosecution's evidence regarding the Northside Boronda's primary activities included Detective Gibson's opinion testimony identifying homicide, attempted homicide, robbery, carjacking, drug sales and possession, and firearm possession as the gang's "primary crimes," the conviction records of individuals the detective opined were Northside Boronda members who committed some of the enumerated crimes, *and* defendant's commission of the attempted robbery at Classic Coachworks and the charged crimes here.

For these reasons, we determine there was substantial evidence to support the primary activities element of the gang statute.

IV. DISPOSITION

The judgment is ordered modified to reflect that the 15-year minimum parole eligibility terms imposed on counts 2 and 4 pursuant to section 186.22, subdivision (b)(5) are stayed. Because the abstract of judgment incorrectly omits the section 186.22, subdivision (b)(5) gang enhancements found true on counts 1, 2, and 4, we will order the abstract to be corrected as follows: the section 186.22, subdivision (b)(5) enhancements shall be listed in the "ENHANCEMENT[S]" section of the abstract (section 2) as applying to counts 1, 2, and 4. In the "TIME IMPOSED OR 'S' FOR STAYED" box, "S" shall be listed. As so modified, the judgment is affirmed. The superior court is ordered to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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GREENWOOD, P.J.

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DANNER, J.

People v. Alvarado
H045500